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ORIGINAL

No. 83-6326

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LACEY M. SIVAK,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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STATEMENT OF THE CASE

The petitioner, Lacey M. Sivak, was convicted of murder in the first degree and sentenced to death. The death sentence was affirmed on review by the Idaho Supreme Court. State v. Sivak, 674 P.2d 396 (Idaho 1983).

The evidence received at trial revealed that Dixie Wilson, an attendant at a self-service gas station, had been stabbed several times and shot several times. She was also sexually molested. 674 P.2d at 398.

The petitioner admitted being present, but claimed he had not committed the murder. However, the evidence against petitioner was strong. His fingerprint was found on the murder weapon, and the firearm used in the attack on Dixie

Wilson was found in a storage shed he had rented. Id. Moreover, appellant had previously worked at the gas station, had expressed animosity toward the victim, and had made a telephone call to inquire whether she would be on duty at the station the day of the attack. Id.

In his appeal to the Idaho Supreme Court, petitioner argued that the Idaho death sentencing statute was unconstitutional because it failed to include the jury in the sentencing process and that there was a state as well as a federal constitutional right to jury sentencing. He also made several constitutional attacks on the Idaho death sentencing statute that are not repeated here.

The Idaho Supreme Court rejected Sivak's contention that the Constitution required jury sentencing in capital cases. It also rejected the argument that the trial court's sentencing findings were inconsistent with the jury verdict. Petitioner presents the latter assertion here as an error of constitutional magnitude, but he did not base it on federal constitutional grounds in the state courts.

The court conducted an independent review of the death penalty and found that the sentence was not excessive or disproportionate to sentences imposed in similar cases. The court found no indication of the existence of arbitrary factors in the imposition of sentence. 674 P.2d at 404.

SUMMARY OF ARGUMENT

1. A sentencing proceeding is broader in the scope of the inquiry conducted there than is a trial. There is no constitutional prohibition which prevents a sentencing judge from finding that a killing committed during the course of a robbery was intentional, even though a jury, presented with alternative theories of first degree murder, chose the "robbery-murder" theory over the premeditated murder theory. In such circumstances, a finding of premeditation for the purpose of sentencing is not inconsistent with the conclusions of the jury based upon an inquiry more limited in its scope. Sivak did not present to the state courts the contention that the asserted inconsistency in the trial court's death sentencing findings violated his federal constitutional protection against being placed twice in jeopardy.

2. Petitioner did not raise, in the state courts, the claim that he was denied a supposed right to confrontation during the sentencing proceedings against him.

3. Neither the Sixth Amendment guarantee of the right to trial by jury nor the due process clause of the Fourteenth Amendment requires that there be jury participation in capital sentencing. The cruel and unusual punishment clause of the Eighth Amendment is concerned with the nature of punishment, not the question of whether a judge or jury shall conduct capital sentencing proceedings.

Judicial sentencing, in fact, is more likely to produce results free from arbitrariness and capriciousness in capital cases than is jury sentencing.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

Petitioner Was Not Denied a Constitutional Right to a Trial by Jury by the Court's Sentencing Findings, nor Was He Twice Placed in Jeopardy. Petitioner Did Not Present the Double Jeopardy Question to the Idaho Supreme Court.

Petitioner complains that the trial court, in the process of finding a statutory aggravating factor on which the death sentence imposed on him was based, reached a factual conclusion inconsistent with a factual finding implicit in the jury's verdict.

A brief summary of the pertinent state statutes as they were applied to petitioner's case may be a useful background. Under Idaho law, as far as is relevant here, murder in the first degree is either an unlawful killing with malice aforethought and premeditation or an unlawful killing with malice aforethought committed in the perpetration of a robbery. Idaho Code § 18-4003(a),(d). Robbery, in other words, is the equivalent of premeditation for the purpose of grading a murder as a first degree murder. In addition, a "robbery murder" is a capital murder if it is shown that the unlawful killing with malice aforethought, committed during a robbery, was accompanied by the specific intent to cause the death of a human being. Idaho Code

§ 19-2515(f)(7). Factual findings necessary to carry a first degree murder into the realm of capital murders are made by the sentencing judge, not the jury. Idaho Code § 19-2515.

The petitioner, Sivak, was charged under alternative theories, one based on premeditation and the other based on the "robbery murder" provisions of Idaho law. The jury chose to convict the petitioner of murder committed in the perpetration of a robbery. App. B, pp. B-14, B-16.* This circumstance leads the petitioner to the conclusion that the district court, at sentencing, acted inconsistently with the jury verdict and sought to make its own finding of premeditation to fill the gap left by the jury's failure to find "premeditated" murder. The petitioner's theory in this respect has reference to the court's finding in support of the statutory aggravating circumstance that the killing was intentional and knowing. The sentencing court, setting out factual occurrences that supported its finding of statutory aggravating circumstances under Idaho Code § 19-2515, observed that the defendant was known to the victim and could be identified by her if left alive after the robbery,

*The court instructed the jury that it could find Sivak guilty of both premeditated murder and murder committed during a robbery, as alleged in separate counts, or either. The court stated that there were distinct and separate theories as to how the murder was committed. Although the jury would have been justified in finding that Sivak committed a sing e first degree murder in two different ways, he obviously could not be punished twice for the same murder.

and that the murder was a calculated and intentional act. (App. B, pp.B-5, B-6.) Petitioner believes that this finding was tantamount to a finding of premeditation.

Petitioner identifies the right to a jury trial and the double jeopardy clause as the constitutional bases of his federal claims. This proposition includes the theory that the constitution forbids the sentencing court to make inquiries at sentencing any broader than the issue of guilt or innocence.

Because the jury had no fact-finding function at the sentencing phase of the proceedings, inasmuch as sentencing is a function of the judge, such findings as the court made at sentencing were original sentencing findings and the concept of inconsistency is out of place.

The remainder of petitioner's argument is contrary to one of the best-settled principles of sentencing law--that the court, in passing sentence, is to take account of all of the relevant factors relating to the offense and the offender. Williams v. New York, 337 U.S. 241 (1949); Roberts v. United States, 445 U.S. 552 (1980); United States v. Grayson, 438 U.S. 41 (1978); Idaho Code § 19-2515; State v. Johnson, 101 Idaho 581, 618 P.2d 759 (1980); State v. Wolfe, 99 Idaho 382, 582 P.2d 728 (1978).

This Court has said that the sentencing judge's inquiry is largely unlimited, either as to the kind of information which may be considered at sentencing or its source.

Roberts, supra; Grayson, supra. This principle certainly precludes a rule to the effect that, should the jury find the defendant guilty of capital murder not requiring premeditation, the court is therefore precluded from considering evidence of premeditation at sentencing.

Petitioner mistakenly relies on Presnell v. Georgia, 439 U.S. 14 (1978) and Cole v. Arkansas, 333 U.S. 196 (1948), to support his argument respecting the asserted inconsistency of the trial court's findings. The cases are not authority for petitioner's position.

Presnell was convicted of the murder of Lori Ann Smith and was sentenced to death by a jury on a finding that the murder had been committed during the commission of another capital felony, namely, the kidnapping with bodily injury of Andrea Furlong. In Georgia the commission of murder during the commission of another capital felony is a statutory aggravating circumstance authorizing the death penalty. It was alleged that the bodily injury aspect of the kidnapping was aggravated sodomy, and the jury was instructed that the death penalty for the murder of Lori Ann Smith depended upon the finding that the kidnapping of Andrea Furlong was attended by aggravated sodomy. The Georgia Supreme Court, without explanation, held that aggravated sodomy could not furnish the bodily injury element of "kidnapping with bodily injury," thus binding this Court. The Georgia court, nonetheless, upheld the death sentence on the theory that

there was evidence that Andrea Furlong had been forcibly raped during the kidnapping. The jury had in fact returned a "rape" verdict against Presnell, but because the jurors had not specified whether the verdict was one of forcible or statutory rape the Georgia courts treated the conviction as one of statutory rape. This meant that the rapes could not be considered to amount to "bodily injury" within the meaning of the capital sentencing statutes.

This Court vacated the death sentence imposed on Presnell for Lori Ann's murder. The Court held that principles of due process required that death sentences be evaluated on appeal as the issues were determined in the trial court. Quoting Cole v. Arkansas, 333 U.S. 196 (1948), the Court stated:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court. [Cole v. Arkansas, 333 U.S. at [201-02]].
>
> * * *
>
> These fundamental principles of procedural fairness apply with no less force at the penalty phase of the trial in a capital case than they do in the guilty-determination phase of any criminal trial ...Presnell v. Georgia, 439 U.S. 14, 16.

The significant facts of Presnell were that in Georgia, in contrast with Idaho procedure, the jury was the fact-finder at sentencing, the jury did not find forcible rape had been committed, and the Georgia Supreme Court had, on

appeal, made a factual finding of forcible rape which the trial-level fact-finder had not. The purpose of the finding was to supply a necessary factual element for a sentence of death. This, said the court, was "procedurally" unfair.

Presumably the unfairness perceived in Presnell was involved with making factual judgments necessary to support a death sentence on appeal that contradicted those found in the trial court. Thus, the validity of Presnell's death sentence was not "appraised" in the Georgia Supreme Court "on consideration of the case as it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 333 U.S. 201-202; Presnell v. Georgia, 439 U.S. 16.

It is obvious that this problem is not present in Sivak's case. In Idaho, the jury does not make factual findings for sentencing purposes. The only facts found in the sentencing phase of the case were those found by the sentencing judge. He was the only sentencing authority. There was no restructuring of facts previously found by an authorized fact-finder. Presnell is not authority for the theory that the sentencing judge must not consider evidence of the facts surrounding the offense merely because there is some possible debate about the implicit meaning of a jury verdict.

Presnell, in short, was a factual revision case. Examination of the charges, the verdict, and the court

sentencing procedures followed by the trial judge make clear that this one was not. Sivak was charged with two counts of first degree murder. By Count 2 (amended information), it was alleged that he murdered Dixie Wilson with premeditation. Count 3 was an alternative count by which it was alleged that the murder was one of the first degree because it was perpetrated by Sivak during the course of a robbery. Idaho Code § 18-4003(d).

Another flaw in petitioner's theory is its failure to recognize that the sentencing proceeding is not entirely analagous to the trial. As the Idaho Supreme Court said in a slightly different but highly relevant context, "[At sentencing] we are not concerned with proof of an element of the offense but rather are engaged in an inquiry into all relevant facts and circumstances which might weigh upon the propriety of capital punishment." State v. Osborn, 102 Idaho 405, 631 P.2d 187, 199 (1981).

The rule that the court is to consider all relevant evidence at sentencing, Roberts v. United States, supra; United States v. Grayson, supra; State v. Osborn, supra, precludes the theory that the sentencing fact-finder, whether it be a judge or jury, is constitutionally or otherwise prohibited from considering aggravating evidence of premeditation merely because the jury found the first degree murder to be one of the variety where necessary proof of premeditation was dispensed with because the legislature

had decided that an intentional killing during a robbery is tantamount to a premeditated murder.

Moreover, because the sentencing proceeding was an original fact-finding function of the judge at the trial level, Presnell, which involved appellate fact-finding inconsistent with facts found by the designated trier of fact, has no applicability.

Finally, the court's sentencing findings were not inconsistent with the jury's verdict.

The charge of murder in the first degree, of which appellant was convicted, was based on the fact that the murder occurred during the commission of a robbery. The robbery substituted for specific proof of premeditation, but it was nonetheless necessary for the jury to find that the killing was intentional. "Murder" is a killing with intent or an equivalent of intent, Idaho Code § 18-4001, and the jury was so instructed. Premeditation, it might be observed, is generally thought to involve a greater degree of deliberation than is to be found in second degree murders. People v. Robillard, 358 P.2d 295 (Calif. 1961); People v. Conley, 411 P.2d 911 (Calif. 1966). Accordingly, it has certain legal qualities differing from mere intent to kill and cannot be thought synonymous with the concept of intentional killing, as petitioner implies. See, also, State v. Carey, 91 Idaho 706, 429 P.2d 836 (1967); State v.

Hokenson, 96 Idaho 283, 527 P.2d 487 (1974); State v. Snowden, 79 Idaho 266, 313 P.2d 706 (1957).

The statutory aggravating factor which makes robbery-murder a capital offense is a specific intent to kill. Idaho Code § 18-2515. The jury thus determines, by its verdict, that the defendant committed an intentional killing or a killing manifested by extreme indifference to life, see State v. Hokenson, supra, during the commission of a robbery. But the jury does not resolve the specific question of whether the killing was intended or was the result of an equivalent of intent, such as extreme indifference to life. It need not make the distinction to find defendant guilty of a robbery-murder. Thus, when the judge goes on at sentencing to find that such a murder was a capital offense because it was connected with the specific intent to kill, he has gone beyond the fact-finding function performed by the jury, not acted inconsistently with it. The court was authorized to do so by statute. Idaho Code § 19-2515(f)(7).

Petitioner also contends that the asserted inconsistency in the trial court's death sentencing findings violated his federal constitutional protection against being placed twice in jeopardy. For the reasons previously stated, it is apparent that the sentencing proceeding is a different proceeding from that at which guilt or innocence is determined. The double jeopardy clause has no relevance

to such circumstances. We need not belabor the question further, however, because petitioner did not present a double jeopardy question in this context to the Idaho Supreme Court, nor did that court consider it. Accordingly, it is not appropriate for this Court to consider the question here. Street v. New York, 394 U.S. 576 (1969); Bailey v. Anderson, 326 U.S. 203 (1945); Michigan v. Tyler, 436 U.S. 499 (1978).

II.

The Petitioner Did Not Properly Raise the Right to Cross-Examine at Sentencing Proceedings.

Petitioner makes what respondent believes to be a legally incorrect argument about the application of the confrontation clause in capital sentencing proceedings. However, petitioner did not present this issue to the Idaho Supreme Court, nor did that court decide it. For those reasons, it would not be appropriate to grant a writ of certiorari addressed to the question. Street v. New York, supra; Bailey v. Anderson, supra; Michigan v. Tyler, supra.

Petitioner made an untimely attempt to raise a confrontation clause issue in a petition for rehearing presented to the Idaho Supreme Court, but the state court declined to grant a rehearing. (Petitioner's Appendix A, p.A-48.) One wonders how the court could have "reheard" what it did not initially hear on appeal. Idaho appellate

practice precludes raising issues for the first time on petitions for rehearing. Metropolitan Life Insurance Co. v. First Security Bank, 94 Idaho 527, 492 P.2d 1400 (1971); Johnson v. Bekins Moving and Storage Co., 86 Idaho 569, 389 P.2d 109 (1964), 7 ALR 3d 709, cert. den., 379 U.S. 913. Petitioner's procedural default in this respect precludes consideration of this claim in the United States Supreme Court. Michigan v. Tyler, supra.

III.

The Constitution Does Not Require that Death Sentences Be Imposed by Juries.

Petitioner argues that there is a constitutional requirement, found in the Eighth Amendment, and in the Sixth and Fourteenth Amendments, that sentencing in capital cases be performed by a jury. The argument comprises several specifications. It is urged:

(1) that a majority of states which authorize imposition of the penalty of death require the participation of a jury in the sentencing decision;

(2) that this court has transformed sentencing proceedings into something like trials; thus a sentencing scheme which involves only a judge in capital sentencing decisions violates the due process clause; and

(3) that "evolving standards of decency," by which cruel and unusual punishment clause cases have often been tested, require jury sentencing in capital cases.

A. Jury Sentencing in Other States.

Petitioner tells the Court that "it is of profound constitutional significance that Idaho stands with only a tiny minority of American states in wholly barring the jury from capital sentencing." (Petition for Certiorari, p.13.) However, unless constitutional questions are now being settled by counting up the number of states that subscribe to a particular practice--and we know of no authority for that proposition--the number of states subscribing to the notion that jury sentencing is desirable in capital cases is not only not of "profound constitutional significance," it is altogether irrelevant.

B. Sixth and Fourteenth Amendment Considerations.

Petitioner argues that the Sixth Amendment guarantee of a trial by jury and the due process clause of the Fourteenth Amendment require that death sentencing be done by juries. Reliance is placed on Bullington v. Missouri, 451 U.S. 430 (1981), which petitioner interprets as an expression by this Court that a capital sentencing hearing is, for constitutional purposes, a trial.

The Court's analysis in Bullington compares sentence fact-finding with trial fact-finding to bring into play the multiple punishments provisions of the double jeopardy

clause. Thus, when the fact-finder has found in defendant's favor on facts necessary to establish aggravating circumstances, the double jeopardy clause forbids the state from relitigating the factual issues identified and passed upon in the previous trial. This analysis applies only to the question of twice litigating aggravating facts when to do so might lead to a harsher sentence, and does not in any respect suggest that all of the evidentiary standards applicable to the determination of guilt or innocence are also applicable to sentencing proceedings. To reach such a result, the Court would have to have overruled Williams v. New York, 337 U.S. 241 (1949), which it has never done. The frequency with which the Court has directed attention to the continuing validity of Williams indicates that it has no intention of so doing. Roberts v. United States, 445 U.S. 552 (1980); Mullaney v. Wilbur, 421 U.S. 684 (1975); United States v. Tucker, 404 U.S. 443 (1972); Williams v. Oklahoma, 358 U.S. 576 (1959). See also, United States v. Horsley, 519 F.2d 1266 (5th Cir. 1975).

It is clear in this Court's decisions that a sentencing proceeding is not a "trial," and none of the cases cited by appellant stand for the proposition that the Sixth and Fourteenth Amendments require jury sentencing in capital cases.

C. The Eighth Amendment "Evolving Standards of Decency" Requirement.

Perhaps the most novel aspect of petitioner's argument that jury sentencing is constitutionally required in capital cases is his reliance on the "evolving standards of decency" referent of those cases which stand for the principle that the cruel and unusual punishment clause of the Eighth Amendment is to be applied by considering the extent to which public opinion has come to regard a particular kind or quality of punishment as abhorrent. In this context, this Court has pointed out:

> [t]hat the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft quoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, supra, at 101... . Thus an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. ...Gregg v. Georgia, 428 U.S. at 173 (1976).

It is apparent that the Court, in considering whether a particular penalty does or does not comport with the "evolving standards of decency that mark the progress of a maturing society," has been in each case concerned with the quality of the penalty provided and not with the question of what sentencing authority must decide upon the penalty. See, for example, Gregg v. Georgia, supra (capital punishment); Trop v. Dulles, 356 U.S. 86 (1958) (denationalization); Robinson v. California, 370 U.S. 660

(1962) (imprisonment for status of being addicted to narcotics); Weems v. United States, 217 U.S. 349 (1910) (imprisonment in chains at hard and painful labor); Francis v. Resweber, 329 U.S. 459 (1947) (second attempt at electrocution).

It should come as no surprise that cruel and unusual punishment clause analysis has been thus limited because the language of the clause is addressed to the appropriateness of particular penalties:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S.Const., Eighth Amendment. (Emphasis added.)

Consistently the cruel and unusual punishment clause has been relevant to the assessment of barbarous metnods of punishment and, as the clause has taken on new meaning with the advancement of social conscience, to methods and varieties of punishment that are offensive in light of contemporary values. Gregg v. Georgia, supra.

Nothing in the history of the clause as it has been interpreted in this Court suggests that it has any relevance to the question of whether the sentence of death shall be imposed judicially or by a jury.

Nevertheless, the petitioner urges that the meaning of the clause must now be expanded to regulate a state legislature's choice of sentencing authority. In doing so, he ignores an admonition of this Court that mirrors a basic

principle of the division of powers between the legislative and judicial departments of government:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
>
> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standard. "In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." [Citation omitted.] Gregg v. Georgia, 428 U.S. at 175 [emphasis added].

In the final analysis, whether the death penalty is imposed by a judge or a jury has nothing to do with whether the penalty is cruel and unusual. There is not a shred of evidence of any kind that judicial sentencing is more likely to result in arbitrary or capricious sentencing decisions than jury sentencing. Indeed, it has been suggested that the opposite is true:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function [citations omitted], but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analagous cases. Proffit v. Florida, 428 U.S. 242, 252 (1976), rehearing denied, 429 U.S. 875.

Although this Court has not directly considered the question of whether jury sentencing is a constitutional requirement, the Court's opinions contain unmistakable indications that no such mandate would be considered to be a part of the Constitution. In Proffit v. Florida, supra, the court upheld a Florida death penalty statute against a cruel and unusual punishment clause challenge. The Florida statute provided for judicial sentencing rather than jury sentencing, and the plurality opinion pointed out that judicial sentencing had an even greater potential for consistency in the imposition of capital punishment and jury sentencing. See also, Barclay v. Florida, ____ U.S. ____, 77 L.Ed.2d 1134 (1983).

In Dobbert v. Florida, 423 U.S. 282 (1977), rehearing denied, 434 U.S. 882 (1977), the Court reviewed a case in which the trial judge overruled the jury's recommendation for a life sentence and sentenced the defendant to death. The Florida statute was upheld in Dobbert. Although the Court was concerned with whether the statute violated the ex post facto clause, it seems significant that the Court found, in the process of determining that the statute was ameliorative and thus not violative of the ex post facto clause, that defendants sentenced under the new statute were not significantly disadvantaged because, pursuant to it, "unlike the old statute, a jury determination of death is not binding. Under the new statute defendants have a second

chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court." 432 U.S. at 296. It seem unlikely that this Court, having once found a judicial sentencing statute constitutional because it was less onerous than a jury sentencing statute, would now be prepared to hold that evolving standards of decency demand jury sentencing.

The constitutionality of Florida's sentencing procedure has received extensive attention from the Florida Supreme Court and from this Court. In Washington v. State, 362 So.2d 658 (Fla. 1977), cert. den. 441 U.S. 937 (1979), the Florida Supreme Court, in a per curiam opinion, upheld a judicially imposed death sentence where the defendant had waived the right to jury input in the sentencing phase of the proceeding. The court rejected various attacks on the interpretation of certain statutory aggravating and mitigating factors.

Florida's Supreme Court has, on at least six occasions, upheld judicial imposition of the death penalty even though the jury had recommended life imprisonment. Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. den., 429 U.S. 873 (1976); Gardner v. State, 313 So.2d 675 (Fla. 1975), reversed on other grounds 430 U.S. 379 (1977); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. State, supra; Barclay v. State, 343 So.2d 1266 (Fla. 1977), reversed on other grounds 362 So.2d 657 (Fla.), cert. den., 439 U.S. 892

(1978); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. den., 439 U.S. 920.

One other sign of this Court's disinclination to consider jury sentencing a constitutional mandate appears in Justice Rehnquist's opinion as a circuit justice in Richmond v. Arizona, 434 U.S. 1323 (1977), rehearing denied, 434 U.S. 976 (1977), in which he ruled that a criminal defendant had no constitutional right to have a jury find facts in aggravation or mitigation of punishment and remarked that "such jury input would not appear to be required under this court's decision in Proffit [v. Florida], supra, 434 U.S. at 1325."

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this 7th day of May, 1984.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, LYNN E. THOMAS, counsel of record for respondent, The State of Idaho, do state under oath, pursuant to Rule 28.2, that the original of the accompanying respondent's MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO was placed in the United States mail on May 7, 1984, first class postage affixed, at Boise, Idaho, addressed to:

Alexander Stevas
Clerk of the Court
U. S. Supreme Court
Washington, DC 20543

LYNN E. THOMAS

SUBSCRIBED AND SWORN TO before me this 7th day of May, 1984.

Notary Public for Idaho
Residing at Boise

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of May, 1984, served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO, by placing same in the United States mail, first class postage prepaid, addressed to Mr. Rolf M. Kehne, Office of Ada County Public Defender, 303 West Bannock Street, Boise, Idaho 83702, counsel of record for petitioner.

LYNN E. THOMAS
Solicitor General
State of Idaho

CERTIFICATE OF SERVICE